SUPREME COURT, U.S.
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No. 88-1469

In The

Supreme Court of the United States

October Term, 1988

DAVID AVALOS and SUSHI, INC.,

Petitioners,

vs.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT HON. GORDON THOMPSON, JR.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a United States Court of Appeals have the authority to dismiss an appeal as moot when, during the course of the appeal, the district court renders judgment against a non-appellee defendant which grants appellants the relief sought and eviscerates the Court of Appeals' ability to render effective relief against the appellees?[1]

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[1] Respondent Thompson believes that this Petition should be denied on procedural grounds. Thus, this Brief in Opposition does not address the substantive issues. Should this Court be inclined to grant certiorari, Respondent Thompson would request an opportunity to brief the substantive issues before this Court grants the Petition.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT HON. GORDON THOMPSON, JR.'S BRIEF IN OPPOSITION[2]

[2] Michael J. Weaver and Sheppard, Mullin, Richter & Hampton have represented Judge Thompson throughout this lawsuit. Judge Thompson received this private representation because of the possibility of a conflict. The United States Department of Justice, which normally would have represented Judge Thompson herein, is representing the General Services Administration as well as GSA employees and Respondents Hamilton and Waggoner.

Respondent Hon. Gordon Thompson, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking reversal of the Ninth Circuit's Order dismissing petitioners' appeal without prejudice. That Order is unpublished.

OPINIONS BELOW[3]

In addition to the opinions set forth in the Petition (Pet., p. 2), Respondent Thompson believes that the district court's opinion regarding the General Services Administration was material to the Ninth Circuit's decision and is relevant to this Court's determination. The text of the district court's Minute Order directing that its Proposed Findings of Fact, Conclusions of Law, and Memorandum of Decision ("Memorandum of Decision") and Proposed Judgment ("Judgment") are final and filed is reprinted in the Appendix hereto as pages A-1 to A-2. The text of the Memorandum of Decision is reprinted in the Appendix as pages A-3 to A-22. The text of the Judgment is reprinted in the Appendix as pages A-23 to A-24.

[3] Respondent Thompson is satisfied with Petitioners' statements concerning Jurisdiction and Constitutional Provisions Involved (Pet., pp. 2-3). Accordingly, this Brief in Opposition does not repeat that information. *See* Supreme Court Rules, Rule 34.1(e), (f); Rule 34.2.

PRELIMINARY STATEMENT

This case does not present any "special and important reasons" which would justify this Court's granting certiorari (Supreme Court Rule 17). To the contrary, the district court's decision that the General Services Administration's ("GSA") revocation of the permit was unlawful and remand to the GSA for further proceedings rendered Petitioners' appeal moot. Any doubt regarding the mootness of the appeal was fully resolved when Petitioners voluntarily chose not to pursue the remand proceedings with the GSA. As a direct result of these developments, the Ninth Circuit properly dismissed Petitioners' appeal as moot. No compelling reason exists for this Court to disturb the Ninth Circuit's ruling.

A. Placement And Removal Of The Artwork.

In December, 1985, Petitioner David Avalos, an artist sponsored by Petitioner Sushi, Inc., filed with the GSA an application for a permit for use of space in the courtyard in front of the United States Courthouse in San Diego, California. The application was incomplete.

In part 4 of the application, rather than describe the proposed activity with any particularity, Petitioners referred to an attached packet of materials which obliquely suggested that they were seeking permission to place a large piece of artwork of painted wood construction entitled "The Tijuana Tourist Donkey Cart" in front of the Courthouse. The packet of materials contained a photograph of the life-size donkey cart without the fence-like apparatus built of wire and timbers that eventually

became a part of the display. Appellants sought permission to place the donkey cart on federal property between January 4, 1986 and January 17, 1986.

Employees of the GSA granted Petitioners' application in accordance with regulations promulgated under the Public Buildings Cooperative Use Act of 1976 (Public Law 94-541), 5 U.S.C. § 706(2). The regulations are set forth at 41 C.F.R. § 101-20.700 *et seq.*

When the artwork was installed on federal grounds in front of the Courthouse, it was completely surrounded by a wire and wood fence-like structure which effectively sealed off the donkey cart portion of the artwork. Normal inspection procedures designed to uncover surreptitiously placed incendiary devices and other security threats were thereby completely thwarted, as security guards could not gain access to the structure through the wire and wood fence. Courthouse security is taken very seriously in the Southern District of California because of past problems.

On January 5, 1986, the artwork was installed in front of, and in close proximity to, the main entrance to the United States Courthouse. On January 6, 1986, Defendant and Respondent Hon. Gordon Thompson, Jr., acting in his capacity as Chief Judge for the Southern District of California, directed the removal of the artwork, citing "security reasons" in a written memorandum. Chief Judge Thompson's directive was motivated by concern expressed to him by the building guards that the wire and wood fence surrounding the artwork prevented adequate inspection for incendiary devices. Chief Judge

Thompson consulted with the other judges of the court before issuing his written directive to the GSA.

Subsequently, and without Chief Judge Thompson's involvement, Respondent Hamilton, the GSA office manager in charge of the Courthouse, advised Petitioners that the permit was revoked. Hamilton requested that Petitioners remove the structure. Like Chief Judge Thompson, the GSA office manager cited "considerations for the security of the building and its occupants." Thereafter, the artwork was removed.

B. Procedural Posture In The District Court.

Petitioners appealed the decision revoking the permit to Respondent Waggoner, the regional director of the GSA. Before their administrative appeal was denied, Petitioners filed, on January 10, 1986, their complaint for damages and for declaratory and injunctive relief. Petitioners' original complaint named as defendants the General Services Administration, Chief Judge Thompson and Respondent Hamilton. All judges in the Southern District recused themselves because they had participated in the decision to direct the removal of the artwork.

Petitioners filed a writ of mandamus with the Ninth Circuit seeking an order directing the district court to set a hearing on Petitioners' application for a temporary restraining order. Petitioners' writ was denied by the Ninth Circuit on January 15, 1986. Because of the recusal of the Southern District's judges, the case was assigned to the Hon. Harry L. Hupp of the Central District of California.

Subsequently, Petitioners' First Amended Complaint was filed. The First Amended Complaint named as defendants the GSA as well as Chief Judge Thompson, Hamilton and Waggoner. The First Amended Complaint sought declaratory and injunctive relief prohibiting the cancellation of the permit and requiring the display of the artwork. As an alternative remedy to be sought only if the display of their art was not attainable, the First Amended Complaint sought damages.

In the Spring of 1986, Chief Judge Thompson and the GSA defendants filed separate motions to dismiss or, in the alternative, for summary judgment. The district court heard extensive oral argument and permitted the filing of supplemental memoranda of points and authorities. On April 16, 1987, the district court issued a careful, 28 page opinion granting the summary judgment motions of Chief Judge Thompson and the individual GSA defendants and denying the motion brought on behalf of the GSA. Pursuant to Federal Rules of Civil Procedure Rule 54(b), judgment was entered on May 5, 1987. On May 14, 1987, Petitioners filed their Notice of Appeal.

C. The District Court Proceedings Regarding The GSA.

On January 15, 1988, while the appeal as to the individual defendants was pending, a trial was held regarding the GSA. As a result of that trial, the district court issued its proposed and, later, its final Memorandum of Decision and Judgment. The district court found that the GSA had unlawfully revoked Petitioner Avalos' permit

and ordered the revocation set aside.[4] Pursuant to the relevant authorities, the district court remanded the matter to the GSA for further consideration rather than ordering the permit renewed and the artwork displayed.

In remanding the matter to the GSA, the district court outlined various constitutional policies which it ordered the GSA to consider in its review. The district court concluded that, while the GSA may properly consider security concerns on remand, it must take into account First Amendment considerations and narrowly tailor its action so as to protect the governmental interests involved without restricting expression unnecessarily.

The judgment entered by the district court was not final. Rather, the court retained jurisdiction, apparently to enable it to review any complaints by Petitioners of the GSA's handling of the remand proceedings. Through the district court's order and remand, Petitioners' rights were fully vindicated and protected.

On remand, the GSA invited Avalos to submit a new application for the display of his artwork. However, Avalos declined to submit a new application and, as a result of his refusal to go forward, the GSA did not undertake any further review of its previous decision revoking the permit. On October 26, 1988, pursuant to an inquiry by the district court, Petitioner Avalos notified

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[4] The district court dismissed Petitioner Sushi's claim against the GSA finding that Sushi held no permit to display artwork and therefore had no standing to pursue its claim (A-5).

the court that he was satisfied with the result of the proceedings and that the judgment previously entered on March 15, 1988 could be deemed final.

D. The Appeal.

As a result of Petitioners' notice of appeal, the appellate process continued as to Chief Judge Thompson, Hamilton and Waggoner. After full briefing by all parties, the matter was set for oral argument on March 10, 1988.

At the commencement of the oral argument the panel was informed of the district court's then proposed decision regarding the GSA. Upon learning that the district court had tentatively found that the revocation of the permit was unlawful and was prepared to remand the matter to the GSA, the panel requested that counsel address their comments to the issue of mootness. The panel then continued the matter pending the entry of the district court's order and the response of the GSA. On August 12, 1988, after the district court entered its Memorandum of Decision and Judgment as to the GSA, the Ninth Circuit dismissed Petitioners' appeal as moot.

On August 23, 1988, Petitioners filed their Petition For Rehearing And Suggestion For Rehearing In [sic] Banc ("Petition for Rehearing"). By Order dated October 20, 1988, the Ninth Circuit requested that the parties notify it of the status of any further GSA remand proceedings.

On October 26, 1988, Petitioners filed their Notice of Status with the Ninth Circuit.[5] At that time, Petitioners notified the court that the GSA had invited Petitioner Avalos to submit a new application for display of his artwork but that Avalos had declined to submit the new application. Petitioners further informed the court that they were satisfied with the district court's judgment against the GSA and had no objection to an order deeming the judgment to be final.

This update reinforced the Ninth Circuit's conclusion that the appeal was moot. Petitioners had voluntarily chosen to forego the opportunity provided to them to obtain the relief sought in their lawsuit: the reissuance of their permit and the display of their art. On December 7, 1988, the Ninth Circuit denied the Petition for Rehearing.

THE PETITION SHOULD BE DENIED

A. There Are No Special And Important Reasons To Grant Certiorari.

This Court's review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are "special and important reasons therefor." (Supreme Court Rule 17). Not only

[5] The text of Petitioners' Notice of Status is reprinted in the Appendix as pages A-25 to A-26. The text of Chief Judge Thompson's Status Report is reprinted in the Appendix as pages A-27 to A-28. The text of the GSA's Status Report is reprinted in the Appendix as pages A-29 to A-47.

does this petition fail to meet this test, but as the Ninth Circuit determined, the case underlying the petition is moot.

It is well established that the merits of an isolated case have only an oblique relevance to the question of whether a petition for certiorari should be granted. *Ponte v. Real*, 471 U.S. 491, 501 (1985) (Stevens, J., concurring). Rather, whether this Court grants review depends on numerous factors other than the perceived correctness of the judgment this Court is asked to review. *Superintendent v. Hill*, 472 U.S. 445, 460 (1985). Generally, certiorari is granted when the question is important and recurring. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959).

No compelling reason to grant the petition exists here. As even Petitioners admit, the issues involved herein are unique and will not recur frequently:

> "To repeat a point made above, petitioners freely acknowledge that this is a kind of dispute that does not and will not arise very often." (Pet., p. 18).

Thus, Petitioners are reduced to arguing that the Ninth Circuit failed to properly decide their appeal. While the unique facts and issues herein may provide the basis for an interesting philosophical discussion, it is not the type of compelling case which is worthy of this Court's attention. The petition should be denied.

B. The Court Of Appeals Properly Dismissed The Appeal As Moot.

As the district court recognized, the relief it could grant Petitioners was limited to holding the GSA's

revocation of the permit unlawful and remanding the matter to the GSA to reconsider its revocation of the permit. The GSA remand proceedings ordered by the district court provided Petitioners with a complete opportunity to have Avalos' permit reissued and the artwork displayed, subject only to reasonable security considerations. Because of these developments, which occurred while the appeal was pending as to the individual defendants, the Court of Appeals realized that it could not grant Petitioners effective relief against the individual respondents, including Chief Judge Thompson. The Ninth Circuit properly dismissed the appeal as moot.

The mootness of the appeal is well illustrated by *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). In *Iron Arrow*, an all male honorary society, which had been banned from a university campus for sex discrimination, sued the university and the Secretary of Health and Human Services for declaratory and injunctive relief. The honor society attempted to prevent the Secretary from interpreting a regulation so as to require the university to ban the society's activities from campus. While the case was on appeal, the university president wrote a letter to the society chief, and so advised the court, that the society would not be allowed to return to campus unless it adopted a nondiscriminatory policy, whether the law required it or not.

This Court held that the university's unequivocal position rendered the case moot and ordered the action dismissed. This Court noted that the federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case or controversy

requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. *Id.* at 70. This Court then held that no such dispute was before it:

> "We think that no resolution of the present dispute between these parties can redress Iron Arrow's asserted grievance. Whatever the correctness of the Secretary's interpretation of the regulation in question, the University has stated unequivocally that it will not allow Iron Arrow to conduct its initiation activities on University property as long as it refuses to admit women. . . . Because of the position that the University has taken irrespective of the outcome of this lawsuit, we conclude that the case is moot . . . " *Id.* at 70, 72.

Similarly, in *Enrico's Inc. v. Rice*, 730 F.2d 1250 (9th Cir. 1984), the Ninth Circuit dismissed an appeal as moot. In *Enrico's*, a cafe owner filed an action for injunctive and declaratory relief against a price posting procedure which had been adopted by the California Department of Alcoholic Beverage Control ("Department"). While the action was pending, a California Court of Appeal held the price posting scheme unlawful and the Department announced the discontinuance of the price posting procedure.

The Ninth Circuit held the appeal was moot. After reaffirming the necessity of having an actual case or controversy before it, the court held:

> "In the case at bar we cannot see the threat of a real or immediate injury to plaintiff that is necessary to demonstrate the existence of a case or controversy. . . . Moreover, this court cannot grant appellant effective relief. Were we to reverse the district court and hold in Enrico's favor, it would receive no relief beyond that already provided by [the California court's decision]. Where events have occurred that

prevent us from granting effective relief, we lack jurisdiction and must dismiss the appeal." *Id.* at 1253-54.

Similarly here, neither the Ninth Circuit nor this Court could grant Petitioners effective relief as to Judge Thompson. By their suit, Petitioners sought to have Avalos' permit renewed and their artwork displayed. No injunction or declaratory relief against Judge Thompson could accomplish this result. Rather, it could only be done, as the district court has ordered, through the remand proceedings with the GSA.[6] It was up to the GSA, as instructed by the district court, to review its unlawful decision revoking Avalos' permit and, if appropriate, to determine under what circumstances the artwork could be displayed. Avalos himself terminated Petitioners' remedy when he refused to file another permit application and declared himself satisfied with the district court's (and apparently the GSA's) proceedings.

Since no effective relief could be granted as to Chief Judge Thompson, the Ninth Circuit properly dismissed Petitioners' appeal as moot.

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[6] As the district court noted, it could not substitute its judgment for that of the GSA. Rather, when the court finds that procedural irregularities, or lack of substantial evidence to support a conclusion exist, it must vacate the decision and remand the matter to the administrative agency for further consideration. *Camp v. Pitts*, 411 U.S. 138 (1973); *Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977). Moreover, there is not now and has never been any evidence to suggest that the individual respondents will refuse to honor the final determination of the GSA.

C. The Ninth Circuit Had The Discretion To Dismiss Petitioners' Appeal.

Even if a case is not technically moot pursuant to the case or controversy provision of Article III, a court may still exercise its discretion and refuse to render a decision. The decision not to decide may be based upon policy reasons rather than purely constitutional considerations.

This was the position taken by this Court in *Kremens v. Bartley*, 431 U.S. 119 (1977). In *Kremens*, this Court refused to determine the constitutionality of Pennsylvania statutes governing the admission and commitment of a person 18 years or younger to a state mental health institution, upon parental consent and over the objection of such juvenile.

Kremens was a class action. While the claims of the named appellees had been mooted, this Court determined that the claims of other class members still existed. However, this Court declined to adjudicate those claims, stating:

> "Constitutional adjudication being a matter of 'great gravity and delicacy,' we base our refusal to pass on the merits on 'the policy rules often invoked by the Court' to avoid passing prematurely on constitutional questions. Because [such] rules operate in 'cases confessedly within [the court's] jurisdiction . . . they find their source in policy, rather than purely constitutional, considerations.' " (Citations omitted). *Id.* at 128.

See also United States v. Grant, 345 U.S. 629 (1952) (although action not moot, no abuse of discretion in trial court's refusal to award injunctive relief).

The two distinct branches of the mootness doctrine were clearly set forth by the District of Columbia Circuit in *In re AOV Industries Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). There, the court refused to grant injunctive or declaratory relief even though the case was not technically moot within the meaning of the Article III case or controversy requirement.

The court discussed its authority to withhold relief:

> "Along with its constitutional aspects, *i.e.*, when the absence of a 'case or controversy' deprives an article [sic] III court of jurisdiction, there exists what we have called 'a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration.' Even when the moving party is not entitled to dismissal on article [sic] III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits. Determinations of mootness in this latter sense cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail." (Citations omitted). *Id.* at 1147-48.

See also Community For Creative Nonviolence v. Hess, 745 F.2d 697 (D.C. Cir. 1984); *Chamber of Commerce v. United States Department Of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

These policies demonstrate the appropriateness of the Ninth Circuit's decision. Even if not technically moot within the meaning of Article III, the ability of the court to grant effective relief as to Chief Judge Thompson was certainly attenuated, at best. Moreover, the constitutional issues presented were difficult and included balancing First Amendment and legitimate courthouse security concerns, the power of one federal district judge to enjoin the

actions of another and the scope of immunity of federal judges. Given the difficult issues and the absence of the opportunity for effective relief, it was well within the Ninth Circuit's discretion to dismiss the appeal.

D. Petitioners' Claim For Damages Will Not Prevent A Finding Of Mootness.

In their First Amended Complaint, Petitioners seek damages as alternative relief if they are unable to obtain the display of their art. Petitioners' claim for damages will not prevent dismissal of their otherwise moot claim.

In *Tawwab v. Metz*, 554 F.2d 22 (2nd Cir. 1977), eight New York state prisoners brought a civil rights action against the officials of a certain state correctional facility claiming that their civil rights had been violated by certain policies at the facility. The inmates sought injunctive relief, declaratory relief and damages. The district court dismissed the complaint.

By the time their claim had reached the appellate court, all the inmates had been transferred to different correctional facilities. The Court of Appeals determined that their claim for injunctive relief was moot. The court further held that the claim for damages did not prevent dismissal of the action:

> "The complaint also contained a general demand for damages. Any award of damages on the facts of this case, as alleged in the complaint, would be so remote and speculative that it could not stand." *Id.* at 24, n. 4.

See also Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980) (claim for attorneys' fees will not salvage an otherwise moot case).

Finally, this court has upheld the dismissal of a moot case where the damages claimed were incidental to the main question. In *Alejandrino v. Quezon*, 271 U.S. 529 (1925), a Philippine Senator, who had been suspended, filed a petition to compel the restoration of his privileges and emoluments as a member of the Philippine Senate. By the time the case reached this Court, the Senator's suspension had lapsed. However, the Senator claimed he was entitled to his pay as a member of the Senate during his suspension.

Since the Senator's suspension had ended and he was acting as a full member of the Senate, this Court held that the Senator's injunction claim was moot. This Court further held that the Senator's salary claim was "incidental" to the main action and would not prevent dismissal:

> "The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below." *Id.* at 535.

Similarly here, Petitioners' alternative prayer for damages does not salvage their otherwise moot claim. Although alternative in nature, Petitioners' damages claim is modeled after *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970) wherein this Court allowed a suit for damages against federal officers for constitutional torts. However, as the district court recognized, a *Bivens* remedy is not available where there is an alternative remedial mechanism provided by law. *See*

Bush v. Lucas, 462 U.S. 367 (1983); *Davis v. Passman*, 442 U.S. 228 (1979). Here, the remedy provided by federal law for review of the defendants' actions is available, and is sought by Petitioners in this very case. The district court has already provided this alternative relief by ordering remanded proceedings by the GSA. Accordingly, Petitioners' *Bivens* action is not available.

As in *Tawwab*, Petitioners' damages claim cannot stand. Moreover, the damages claim is merely incidental to Petitioners' primary goal of receiving a renewed permit and displaying their art. As such, Petitioners' damages claim cannot save the lawsuit from dismissal as to Chief Judge Thompson.

Since this Petition fails to set forth a compelling case for decision by this Court and the issues are moot as to Chief Judge Thompson, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent Hon. Gordon Thompson, Jr. respectfully submits that this Court should deny the Petition for Writ of Certiorari.

Dated: April 5, 1989.

Respectfully submitted,

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By: MICHAEL J. WEAVER

Attorneys for Respondent
Hon. Gordon Thompson, Jr.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV86 – 0043 – HLH Date March 9, 1988

Title Avalos v. General Services Administration, et. al

DOCKET ENTRY

PRESENT:
HON. HARRY L. HUPP, JUDGE
Robert Bolton
Deputy Clerk Court Recorder (ESR)

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: Filing of Findings, Conclusions, and Judgment

ORDER (also, if applicable, findings and memorandum opinion):

The Findings, Conclusions, and Memorandum previously served on counsel as "Proposed", are signed and filed this date. The Judgment agreed as to form by counsel is signed and filed this date.

GSA's objections are believed by the court to be adequately discussed in the Memorandum and have not led to any change.

Plaintiff's suggestion that the Memorandum be published in the Federal Supplement is noted. In the court's opinion, most opinion's published in the Federal Supplement add nothing to the law and cause an unnecessary devastation of the forests for no useful purpose. However, the suggestion that this memorandum may serve a useful purpose if published because there is little or no published matter interpreting the PBCUA has some merit. If neither party is going to take this matter to the 9th Circuit, the court will consider publishing the memorandum. The court will ask the parties to inform the court in due course if the matter is to be appealed; if not, the court will consider whether to publish the decision.

The court is unaware whether this decision may be relevant to the 9th Circuit consideration of the qualified immunity point. If either party believes so, the court requests that party to notify the 9th Circuit of this determination by sending a copy to the 9th Circuit or by otherwise including it in the appellate record.

Initials of Deputy Clerk___

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS and SUSHI, INC. Plaintiffs, vs. GENERAL SERVICES ADMIN., HON. GORDON THOMPSON, JR., PAUL HAMILTON, and PHILIP WAGGONER, Defendants.	No. CV86-0043-HLH FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OF DECISION (Filed Mar. 9, 1988)

This matter was tried as to the Administrative Procedure Act issues on January 15, 1988. The evidence in the matter consisted of documents and depositions received in evidence. The matter was argued by conference telephone call, Gregory Marshall, Esq., appearing for the plaintiffs and speaking from San Diego, California; Anne L. Weismann, Esq., representing the defendant General Services Administration (GSA), and speaking from Washington, D. C., with the Court hearing argument in the Federal Courthouse in Los Angeles, California.

1. *History of this action*. This action was first filed on January 10, 1986, and an amended and supplemental complaint was filed on March 3, 1986. The complaint alleged claims against Chief Judge Gordon Thompson, and General Services Administration (GSA) executives Paul Hamilton and Philip Waggoner, and sought injunction, declaratory relief, and, alternatively, damages under

a *Bivens* theory. As amended, the complaint added a claim for administrative review under the Administrative Procedure Act (APA) against GSA. Motions to dismiss and for summary judgment were filed by all defendants. On April 16, 1987, the Court granted summary judgment to the individual defendants (Chief Judge Thompson, Mr. Hamilton, and Mr. Waggoner) based on the doctrine of qualified immunity, and this judgment is now on appeal to the Ninth Circuit Court of Appeals. The Court denied summary judgment to GSA. Thus, the issues tried were those for review of the administrative action taken by GSA.

2. *Jurisdiction.* Jurisdiction of this Court is granted by 28 U.S.C. § 1331 and the APA (5 U.S.C. § 701, *et. seq.*).

3. *Facts.* In the Order filed April 16, 1987, the Court determined that certain facts were without substantial controversy. Insofar as those facts are relevant to the APA review, they are adopted from that Order as set forth hereafter. Certain additional facts derived from the additional evidence presented on the trial of the matter are set forth. Certain facts relevant to the grant of the summary judgment motion on the *Bivens* claims and the application of the absolute and qualified immunity doctrines are not relevant to the APA issues and certain of those facts contained in the April 16, 1987 Order are eliminated from these findings, even though still without substantial controversy. The facts are found as follows:

Plaintiff, David Avalos, is an artist who has created artworks, including the one at question in this lawsuit, which contain expressions regarding the situation of alien Mexican laborers in this country. The other plaintiff,

Sushi, Inc., sponsored a showing of "street art" in the city of San Diego in January 1986. Sushi, Inc., held no permit and has no standing to participate in the portion of the case requesting administrative review. Its claim will be dismissed.

Congress has enacted authorization for certain use by the public of federal buildings and grounds. (Public Buildings Cooperative Use Act of 1976, P.L. 94-541; 40 U.S.C. § 601a; hereafter PBCUA.) GSA, whose duties include management of federal buildings, has adopted regulations under PBCUA allowing the "occasional use" of public areas in public buildings and grounds for "cultural, educational, and recreational activities." Pursuant to those regulations, GSA has developed a permit application process.

Avalos through an agent applied for a permit to display his work "San Diego Donkey Cart" (hereinafter referred to as "the work" or "the work of art") in an outdoor area on the grounds of the Federal Courthouse in San Diego located between the sidewalk and front door of the Courthouse. The place where the artwork was ultimately located was approximately 84 feet from the front door of the Courthouse and approximately 34 feet from the sidewalk. The application contained a picture of a model of the proposed work of art. The work purportedly depicted a San Diego version of a "Tijuana donkey cart" (apparently a common tourist attraction in Tijuana, consisting of a small cart pulled by a donkey in which the tourists may ride.) Avalos' work depicted a Latino on the donkey cart being frisked by a man in the uniform of a Border Patrol agent.

When Avalos' agent applied for a permit, the clerical employee of the GSA receiving the application inquired as to what precautions there were to prevent damage to the display by children climbing over the display. There is a dispute of fact as to whether the clerical employee suggested a fence. Avalos' agent so testified. The clerical employee recalls being concerned about the safety of the work displayed, but does not recall suggesting a fence. The Court resolves this dispute by finding that the employee suggested that Avalos consider a fence or other protective device to protect the display. When this matter was reported to Avalos, he agreed that such would be appropriate, expressing the thought that such a fence was in consonance with the artistic message intended to be conveyed. Accordingly, when erected, the representation of the "San Diego donkey cart" was surrounded by a stout fence consisting of wooden posts, chain link, and barbed wire, securely enclosing the work. The application, however, was never amended to show the existence of the fence, its appearance, or its construction. The GSA employee had no authority to suggest any modifications in the display. The Court concludes that Avalos caused the fence to be erected because it was in accordance with the artistic impression he intended to create and that Avalos fully adopted the fence as a part of his artistic display.

The permit was duly issued by GSA for the period January 4, 1986, to January 17, 1986. Mr. Avalos' work of art was installed on Sunday, January 5, 1986. The next morning, Monday, January 6, 1986, defendant Gordon Thompson, Jr., Chief Judge of the United States District Court for the Southern District of California was

approached by a building guard. The record does not reveal whether the guard was an employee of the Federal Protective Service (the security arm of the GSA) or of the United States Marshal (the security arm of the Federal District Court). The building guard advised Chief Judge Thompson that in the opinion of the security staff the artwork constituted a security hazard. The building guard reported that the structure could not be routinely inspected and that the wire and wood fence prevented the guard from making close inspections for any explosive device or other dangerous material. During the noon hour, Chief Judge Thompson conferred with the other judges of the court. The judges agreed that the structure constituted a security threat. At approximately 3 p.m. on January 6, Chief Judge Thompson informed defendant Paul Hamilton, GSA's manager of the courthouse building, of the position of the court and specifically requested that the sculpture be removed because of the perceived security threat. Mr. Hamilton requested that Chief Judge Thompson confirm this position in writing. Chief Judge Thompson then wrote a memo to Mr. Hamilton the text of which stated as follows:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The memorandum was signed by Chief Judge Thompson. Mr. Hamilton orally advised Mr. Avalos that Chief Judge Thompson had directed removal of the artwork.

Following Mr. Hamilton's phone call to Mr. Avalos on January 6, a letter from Mr. Hamilton was delivered to Mr. Avalos dated that same day which reads in part:

> "The permit for use of space in public buildings and grounds issued to you on December 10, 1985, is hereby revoked. Please have the piece removed not later than 8 p.m. this date.
>
> This action is taken based on the provisions of Federal Property Management Regulations, Title 41, Code of Federal Regulations, Chapter 101, paragraph 101-20.7 and considerations for the security of the building and its occupants."

Mr. Avalos did not remove the artwork. Thereafter, employees of GSA removed the artwork and stored it until picked up by Mr. Avalos.

Mr. Avalos consulted the American Civil Liberties Union, whose attorney represents Mr. Avalos in this lawsuit. This lawsuit was intitially filed on January 10, 1986. A First Amended Complaint was filed on March 3, 1986. (The First Amended Complaint contains allegations of facts occurring after January 10, and to that extent should have been denominated a "First Amended and Supplemental Complaint." The Court so considers it.) In addition to filing this action, Mr. Avalos pursued administrative remedies under the GSA regulations. The regulations (41 C.F.R. §§ 101-20.7, *et seq.*) provide the grounds for disapproval of or cancellation of a permit. Section 101-20.704, provides for a type of "appeal" from a cancellation of a permit. The appeal allowed, however, is not a full due process type administrative hearing, but instead consists of an application for review to the GSA "regional officer" (the immediate supervisor of the building manager), who shall conduct an informal review, including hearing orally from both the building manager and from the appellant and shall render a decision. A decision is to be rendered within ten days of the time the

appeal is received by the regional officer. The regional officer reviewing Mr. Avalos' appeal was defendant Philip Waggoner, whose official title is "Director of Buildings Management Division, Region 9 of the General Services Administration."

The filing of this lawsuit on January 10, 1986, coincided with the filing of the administrative appeal, which was received by GSA on January 13, 1986. In his consideration of the appeal, Mr. Waggoner conversed with Mr. Hamilton on several occasions, and with one of Mr. Hamilton's subordinates. He did not discuss the case with the clerical employee who had dealt with Avalos' agent in receiving the application for the permit. On the ninth day after receipt of the appeal, Mr. Waggoner called Mr. Avalos and asked whether Mr. Avalos wanted to submit any further material beyond his letter of January 10. Mr. Avalos replied that he wished to submit no further material. Mr. Avalos was not told that Mr. Waggoner was considering other grounds for affirming the appeal than those set forth in Mr. Hamilton's letter revoking the permit. Mr. Avalos was also not advised that he could make an oral presentation. On January 23, 1986, the tenth day after receipt of the appeal, Mr. Waggoner denied the appeal. He stated first that the appeal was moot, as the permit had expired on January 17, 1986. He also set forth an alternative ground, as follows:

> "Secondly, when the permit was issued, your display was understood to be open. However, when erected, unlike photographs supplied with your application, your display was enclosed completely by a fence approximately 8' by 10' and made up of two-by-fours, barbed wires, and chain link fence. Thus, your display varied from your application."

Thereafter, as set forth above, the complaint in this action was amended to include an action for court review under the Administrative Procedure Act.

4. *GSA regulations.* At the time of the appeal in question, GSA regulations dealing with the Public Buildings Cooperative Use Act (PBCUA) were contained in 41 C.F.R. Chapter 101-20.7, *et. seq.* (The regulations have subsequently been amended somewhat and are now found in 41 C.F.R. 101-20.4, *et. seq.*)

Reference hereafter will be to the regulations in effect at the time. The full text of the regulations has been received in evidence and the Court takes judicial notice of them. In substance, the regulations are adopted by GSA to carry out the determination by Congress that federal public buildings may be used for "cultural, educational, and recreational activities." The regulations set up a permit system under which one desiring to use a public building or area may submit an application for a permit and provide certain specified information. A failure to provide the specified information leads, under the regulations, to a denial of the permit (41 C.F.R. 101-20.702(d)). Grounds for disapproval of an application for a permit or for cancellation of a permit are set forth in 41 C.F.R. 101-20.703(a). The permit may be denied or canceled, *inter alia,* when the use allowed "disrupts the official business of the agency or agencies occupying the public buildings"; "interferes with a tenant's quiet enjoyment of their leasehold"; or "pertains to any judicial proceeding then pending in the public building and this use is intended to influence or impede the judicial proceeding"; and, lastly, when the use "is being conducted with a

permit issued in response to an intentionally false or incomplete application."

When a permit is disapproved or canceled, the applicant or permittee has five days to appeal (41 C.F.R. 101-20.704(a)). The regulations provide:

> "Although a trial-type hearing or presentation is not required, the applicant or permittee and the Buildings Manager shall have the opportunity to orally state the reasons that the application or cancellation should or should not be approved. Written materials and documents may also be submitted. The Regional Officer shall affirm or reverse the Buildings Manager's determination based on this information." (41 C.F.R. § 101-20.704(b))

The Regional Officer must make this determination within ten days of receipt of the appeal, or the permit is deemed granted or the cancellation set aside.

5. *Standard of review.* The APA provides that judicial review may be had of administrative action (5 U.S.C. § 702). Where the statute creating the administrative agency provides a method of review, the Court is to follow that method. In the absence of a method of review provided by statute, "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus" may be brought in a court of competent jurisdiction (5 U.S.C. § 703). Such is the case here; neither the PBCUA nor the administrative regulations provide for a method of court review. Accordingly, the review is a non-statutory review pursuant to Section 703 of the APA. The scope of review is set forth in 5 U.S.C. § 706. The Court may direct that agency action be set aside if found to be

"arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A), "contrary to constitutional right. . . ." (Section 706(2)(B); or "without observance of procedure required by law" (Section 706(2)(D)).

6. *Record on review.* GSA argues that the Court is limited to considering the application for a permit, the permit, Mr. Hamilton's letter canceling the permit, and Mr. Waggoner's determination on administrative appeal, because those items are the "administrative record." The Court does not agree. Were this a review of an administrative proceeding where issues are framed by administrative pleadings, where evidence is taken consonant with due process (that is, with both parties represented, with evidence taken under oath, and with direct and cross-examination), and with findings of fact made, the Court would agree that it should decide the case on the basis of the administrative record. However, the administrative review here was not that kind of proceeding. No issues were framed. No evidence in the formal sense was taken. Mr. Avalos did not know what facts were being gathered or considered by Mr. Waggoner. Mr. Waggoner made no record of what information he had gathered. Thus, GSA is incorrect, in the Court's opinion, when it argues that it is restricted to the "administrative record," there being no such.

The case cited by GSA for its argument, *Florida Power & Light Co. v. Lorion* (1985) 470 U.S. 729, 84 L.Ed.2d 643, discusses certain of these considerations. GSA quotes the case as stating that:

> "A formal hearing before the agency is in no way necessary to the compilation of an agency record

> . . . agencies typically compile records in the course of informal agency action. The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred."

The difficulty with citing that passage in this case is that there is no agency record of facts at all. The Court determines that where the agency action, taken by the reviewing administrative officer, is not based upon an administrative record, it may consider relevant factual evidence to determine whether the action taken by the agency is "arbitrary, capricious, and an abuse of discretion." Thus, the deposition testimony of Mr. Waggoner, Mr. Hamilton, and Ms. Hill (the clerical employee) were admitted over GSA's objection. (Cf. *Camp v. Pitts* (1973) 411 U.S. 138, 36 L.Ed.2d 106; *Bunker Hill Co. v. EPA* (9th Cir. 1977) 572 F.2d 1286, 1292; *Doria Mining and Engineering Corp. v. Morton* (9th Cir. 1979) 608 F.2d 1255, 1258. This Court fully understands that where an administrative record was developed below in a more formalized proceeding, it would normally be limited to a review of that administrative record. However, such is not the case here.

In this case, the regulations above summarized provide for an informal administrative review. The reviewing officer is not to frame issues, take evidence, and make findings, but is merely to confer orally with the subordinate GSA personnel and the applicant, and informally and summarily decide the appeal. There is nothing inherently wrong with such a regulation; all administrative action need not be based upon a full post formal hearing administrative record. However, when challenged in court on a non-statutory review under the APA, the Court must be free to allow the development of

sufficient facts to show whether the determination was arbitrary, capricious, and an abuse of discretion, or impermissibly impinged upon constitutional rights, or followed the prescribed procedure. Thus, evidence outside the "administrative record" was received by the Court for this limited purpose.

7. *Evaluation of the record.* GSA correctly asserts that the decision to be reviewed is the final decision of the agency, not interim decisions (5 U.S.C. § 704; *Williams v. Bell* (D.C. Cir. 1978) 587 F.2d 1240, 1246 n.51). Thus, a number of hotly contested inferences argued by the parties are not here to be considered. When Mr. Hamilton initially revoked the permit, he made vague all inclusive reference to the regulations, and also indicated that the permit was revoked on security grounds. That letter had been preceded by Chief Judge Thompson's directive to remove the work for security reasons. However, upon review of Mr. Hamilton's decision, the affirmance of the cancellation of the permit was placed by Mr. Waggoner on different grounds. Mr. Waggoner did not affirm the cancellation of the permit for security reasons; he made no reference to security. Neither did he point to the first nine grounds listed in 41 C.F.R. § 101-20.703(a)(1) thru (9). Instead, he affirmed the cancellation of the permit on two grounds: first, that it was moot, the permit period having expired, and second, that the application was incomplete in that it did not show the existence of the fence placed around the display. The latter is an obvious reference to Section 101-20.703(a)(10) which refers to a display "conducted with a permit issued in response to an intentionally false or incomplete application." It is therefore,

necessary, to review the evidence on the two grounds relied upon by Mr. Waggoner.

a. *Affirming cancellation of the permit on the ground of mootness was arbitrary, capricious, and an abuse of discretion.* By the time Mr. Waggoner decided the appeal, the time specified in the permit had run its course. The problem with declaring the appeal moot is that the appeal process itself is what made the appeal moot. This is a "Catch 22." If the application for a permit had been denied in the first place and appealed, this ground certainly would not have been relied upon. To say that the passage of time caused by the administrative appellate process can itself create grounds for denial of the cancellation of the permit is a logical absurdity. If the permit should not have been canceled, or should have been allowed to stand with modifications, then the plaintiff should be allowed to display his work of art in a modified period of time equal with the remaining length of time granted on the initial permit. In this respect, the Court believes that the time during which the work may be exhibited is tolled during the period of time it was not allowed to be exhibited, and the decision to the contrary is arbitrary and capricious, since in effect it nullifies the whole appeal process provided for in the regulations.

b. *Affirming cancellation on the basis that the application was incomplete was, on the facts of this case, an abuse of discretion and without observance of the procedure required by law.* The determination by Mr. Waggoner that the application was incomplete has a basis in the facts. The application as filed by Mr. Avalos' agent did not make reference to the fence consisting of wood two-by-fours, chain link and barbed wire. The fence was added to the display by

Mr. Avalos after the application was filed. While the original suggestion that some protection be added to the artwork may have come from a low level non-authorized GSA employee, the addition of the fence must be considered to be an addition to the artwork by Mr. Avalos in this case. He enthusiastically accepted the suggestion as consonant with the message he desired to convey, and designed the fence. The application was not amended. To this extent, the application was "incomplete," although a low level non-authorized GSA employee, who had no decision making power, had discussed the subject matter with Mr. Avalos' agent. The management employee granting the permit had no knowledge of the fence. It is unclear whether such knowledge would have affected the issuance of the permit and the record does not permit answer to that question.

Plaintiff argues that the regulation should be construed so that the incompleteness of the application must be intentional. The Court does not construe the regulations in that way. The regulations refer to "an intentionally false or incomplete application." It is determined that the word "intentionally" modifies "false," but not "incomplete." This interpretation appears necessary to carry out the intent of the regulations, which is to allow the building manager to see that the proposed display complies with GSA regulations. Such function cannot be accomplished unless the application is materially complete, whether or not the failure to make the application complete is intentional or not. Accordingly, the Court construes the word "intentionally" to modify "false" but not "incomplete." Thus, the application could have been disapproved, or the permit canceled, if the application

was incomplete in a material respect. The existence of the fence was material. This interpretation reached above is reinforced by the amended version of the regulations (see present 41 C.F.R. § 101-20.403(a)(1) which allows disapproval or cancellation if "the applicant has failed to submit all information required under Section 101-20.401, or has falsified such information"). Thus, the finding by Mr. Waggoner on review is supported by substantial evidence.

However, there are procedural problems with Mr. Waggoner's determination. Under Section 706, the Court must set aside agency action found to be "without observance of procedure required by law." Mr. Avalos was never given notice that the non-description of the fence in the application was considered to be a problem. The original ground conveyed to him was that the work was a security risk. While the regulations provide that Mr. Avalos was authorized to make an oral presentation to the reviewing executive, he was never allowed to do so. While he was asked if he wished to submit other materials, but was not asked is he wished to make any oral presentation. In addition, he was not informed by Mr. Waggoner when the inquiry was made about additional materials that there was any thought of affirming the cancellation of the permit because the application was incomplete. A fair procedure requires that Mr. Avalos be given a chance to make an oral presentation on the items to be relied upon by the reviewing officer. Had such an opportunity been given, Mr. Avalos could have explained how it came to be that a fence was around the object, and might have achieved a modified result (removal of the fence), or other result consonant with exhibition of his

work under the regulations. Thus, the Court finds that while the grounds specified by Mr. Waggoner are supported by substantial evidence, it also finds that the conclusion was reached without allowing the oral presentation required by the regulations as interpreted to allow an oral presentation on the items to be considered by the reviewing executive.

8. *The matter must be remanded for further administrative appellate review by GSA.* As pointed out by GSA in its trial brief, the Court may not substitute its judgment for that of the administrative agency. When it finds that procedural irregularities, or lack of substantial evidence to support a conclusion, exist, it must vacate the decision and remand the matter to the administrative agency for further consideration (*Camp v. Pitts* (1973) 411 U.S. 138, 36 L.Ed.2d 106; *Bunker Hill Co. v. EPA* (9th Cir. 1977) 572 F.2d 1286). Thus, the Court may not determine what action is to be taken by the agency or direct that the agency proceed in a particular manner. It must remand the matter to the agency for its consideration in view of the determinations made by the Court based upon the administrative record.

9. *Constitutional considerations.* There has thus far not been mentioned in this memorandum the constitutional considerations advanced by the plaintiff. Yet they underly an important point which must be considered on remand by the agency. Plaintiff's work contains an expression of social and political viewpoints. While such social and political viewpoints may not be necessary for First Amendment protection, certainly such an expression of viewpoint brings the First Amendment into sharp focus. Plaintiff's basic theory in this case is that all of the

reasons given by the defendants are a mere sham and pretense, and that the real reason was that the individual defendants disapproved of the social and political viewpoint expressed by the artwork. Each defendant has denied being so motivated. As the Court explained in its Memorandum on the granting of summary judgment, the individual motivations of the defendants are not relevant when considering qualified immunity, and therefore no inquiry has been made into those motivations and thoughts. No findings have been made upon them.

It is true, as acknowledged by plaintiff during oral argument, that the government need not make public buildings devoted to particular purposes open to displays of works or displays at all (unless the building has become a "public forum"). (*Perry Education Assn. v. Perry Local Educator's Assn.* (1983) 460 U.S. 37, 46, 74 L.Ed.2d 794, 805 (Public property not by tradition a forum for public communication may be reserved for its intended purposes, as long as restraint is reasonable and not an effort to suppress a particular viewpoint); *United States v. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736.) However, Congress in the Public Buildings Cooperative Use Act has required a different policy, *i.e.*, that buildings otherwise devoted to particular government purposes may be opened for displays of artworks. Neither Congress nor GSA in its regulations has placed a content qualification on the types of works which might be displayed, and it is doubtful if such could be placed consonant with the First Amendment. Accordingly, it is clear, and nobody has disputed, that Mr. Avalos' work could not be rejected for display because of its content. Only if the work interfered with the use of the building for its intended purpose by

the government could the work be rejected. Thus, GSA's regulations properly do not provide as a ground for disallowance of a permit such action based on the content of the art or other work, with the exception of allowing disapproval for obscene works (41 C.F.R. § 101-20.703(7)). However, the work may be rejected if it "disrupts the official business of the agency or agencies occupying the public buildings" and "interferes with a tenant's quiet enjoyment of their leasehold." (These grounds are sufficiently broad to include security considerations.)

These considerations lead to several important points to be considered by GSA's appellate reviewing officer on remand. The work of art may not be rejected because of its expressive content, a point not disputed by anybody. Contrary to plaintiff's contention, however, the proper use of the building as a courthouse, with implications for security requirements of federal judicial business, may be considered. GSA's administrative appellate decision did not rely upon the security considerations relied upon by the building manager. On remand, however, if security considerations are relevant, then they may be considered.

There is an additional constitutional point which must be considered. When First Amendment considerations are involved, then the action to be taken must be narrowly tailored so as to protect the government interests involved but not be broader than the necessity requires. The actions must also be content neutral and leave open alternative channels for communication. (*Clark v. Community for Creative Nonviolence* (1984) 468 U.S. 288, 293, 82 L.Ed. 2d 221; *City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 80 L.Ed.2d 772; *United States v. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736;

Perry Education Assn., supra; Heffron v. International Society for Krishna Consciousness (1981) 452 U.S. 640, 69 L.Ed.2d 298.) Thus, if it be believed that the fence provides a security risk, or that the application is incomplete by reason of the failure to describe the fence, then the reviewing officer may consider whether the work of art, with fence, may be erected at some other site where it does not provide a security problem, or may be displayed in a way which obviates the security problem (*i.e.*, without the fence, or with openings in the fence). In summary, without determining how the matter is to be resolved by GSA, not within this Court's function, GSA may consider whether placement at another location or modification of the display as shown are necessary conditions upon reinstating any permit, if such is warranted by the facts found to exist. GSA's hearing officer may not be convinced, after hearing presentations of the parties, that the fact that the fence was initially suggested as a possibility by GSA clerical employee excuses the failure to later add the fence to the already filed application. However, if such decision is made, GSA must keep in mind the necessity for narrow restrictions on displays so as to permit First Amendment expressions without impinging on necessary governmental functions.

10. *Conclusion.* Judgment will issue requiring setting aside the decision of GSA's Regional Director of the Buildings Management Division of GSA and remanding the same to GSA for further action in accordance with this determination. Plaintiff is to provide a proposed form of Judgment. It is contemplated that this Memorandum will be the Court's Findings and Conclusions. The

judgment remanding the matter may not be a final determination for appellate purposes. If so, the Court will consider certification of the judgment on the request of a party desiring appellate review of the decision.

DATED: March 9, 1988.

HARRY L. HUPP
United States District Judge

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	No. 86-0043-HLH
v.	)	*JUDGMENT*
GENERAL SERVICES ADMINISTRATION, Defendant.	)	(F.R.Civ.P., rule 54) (Filed Mar. 9, 1988)

This matter came on for trial as to the Administrative Procedure Act issues on January 15, 1988. Gregory Marshall appeared on behalf of plaintiffs. Anne L. Weismann appeared on behalf of defendant General Services Administration. The court admitted documentary evidence, as more fully described at pages 10 to 13 of the Memorandum of Decision filed and entered previously with regard to this proceeding. The court heard argument of the parties and took the matter under submission.

IT IS HEREBY ADJUDGED AND DECREED AS FOLLOWS:

1. Sushi, Incorporated, a named plaintiff in this case, has no standing to pursue relief as against defendant General Services Administration and, accordingly,

its claim(s) against General Services Administration are dismissed.

2. The action of General Services Administration in January, 1986, cancelling or revoking a permit previously issued to plaintiff David Avalos under terms of the Public Buildings Cooperative Use Act of 1976, and regulations thereunder, is held unlawful and is set aside.

Date: Mar 9, 1988

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

Approved as to form:

/s/ Anne L. Weismann
ANNE L. WEISMANN

Attorney for Defendant

/s/ Gregory Marshall
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID AVALOS, et. al., Plaintiffs/Appellants,	)	No. 87-5939
v.	)	
GENERAL SERVICES ADMINISTRATION, et. al., Defendants/Appellees.	)	

PLAINTIFF'S NOTICE OF STATUS

The Court has inquired regarding the status of any further General Services Administration remand proceedings since June 28, 1988.

The General Services Administration has conducted no remand proceedings in this matter since June 28, 1988, nor has the GSA conducted any remand proceedings since entry of the District Court Judgment on March 15, 1988 (copy attached) which concluded:

> "The action of General Services Administration in January, 1986, cancelling or revoking a permit previously issued to plaintiff David Avalos under terms of the Public Buildings Cooperative Use Act of

1976, and regulations thereunder, is held unlawful and is set aside."

The General Services Administration did invite the plaintiff to submit a new application for display of his art work but plaintiff has declined to submit a new application. The GSA has not undertaken any further review of its previous unlawful decision cancelling or revoking the original permit.

The District Court has requested the parties show cause in writing why the judgment against the General Services Administration should not be deemed a final judgment. (Minute Order attached.) Expressing satisfaction with the judgment against the GSA, plaintiff has advised the District Court that he has no objection to an order deeming the judgment to be final. (Response of Plaintiff David Avalos to OSC Why Judgment Should Not Be Deemed Final, attached.)

In any event, the status of General Services Administration proceedings has no real pertinence to the decision in this appeal which only raises issues regarding the availability of damages and declaratory relief against the individually named defendants.

Respectfully submitted,

DATE: Oct. 26, 1988 /s/ Gregory Marshall
GREGORY MARSHALL
Attorney for Plaintiffs

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Attorneys for Defendant-Appellee
THE HONORABLE GORDON THOMPSON, JR.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID AVALOS and SUSHI, INC., Plaintiffs-Appellants, v. GENERAL SERVICES ADMINISTRATION; HON. GORDON THOMPSON, JR.; PAUL HAMILTON; PHILIP WAGGONER, Defendants-Appellees.	Case No. 87-5939

STATUS REPORT

By Order dated October 20, 1988, the parties were requested to advise the Court, no later than November 2, 1988, of the status of any further General Services Administration proceedings.

Defendant and appellee, The Honorable Gordon Thompson, Jr., has no information responsive to the Court's request. No one has advised Judge Thompson or

his counsel of any developments since the Ninth Circuit dismissed the appeal as being moot in August of 1988.

In a pleading dated October 26, 1988, counsel for the Plaintiffs and appellants advised this Court that there are remaining issues relating to both money damages and declaratory relief which should be considered in connection with the dismissed appeal. It is our position that the dismissed appeal has been and remains moot. The plaintiffs-appellants were provided with specific rights and remedies by the District Court which they have apparently elected not to pursue. It is their own conduct and not that of any of the defendants-appellees which has led to the current situation.

DATED: October 28, 1988.

SHEPPARD, MULLIN, RICHTER
& HAMPTON

By: /s/ Michael J. Weaver
MICHAEL J. WEAVER
Attorneys for Defendant-
Appellee
THE HONORABLE GORDON
THOMPSON, JR.

(SEAL) **U.S. Department of Justice**
REK:BLH:RAOlderman:ccm Telephone:
45-13-1005 (202) 633-3542

Washington, D.C. 20530
NOV 1 1988

Cathy Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
Post Office Building
7th & Mission Streets
San Francisco, CA 94103

Re: *David Avalos v. General Services Administration (9th Cir. No. 87-5939), Appeal Dismissed 8/12/88*

Dear Ms. Catterson:

On August 12, 1988, the Court dismissed the appeal in this case without prejudice, pending resolution of proceedings on remand before the General Services Administration ("GSA"). By order of October 20, 1988, the Court requested all parties to advise it, by November 2, 1988, "of the status of any further General Services Administration remand proceedings since June 28, 1988." We wish to advise the Court, on behalf of GSA, as follows.

This Court stayed the appeal in this case, and then dismissed the appeal without prejudice, because it believed that the action taken by GSA on remand would provide the plaintiff with a suitable remedy, *i.e.* a permit to display his work of art at the federal court house in San Diego. However, while GSA informed the plaintiff that it was ready and willing to comply with Federal District Court Judge Hupp's remand order, the plaintiff

has refused to cooperate with GSA in every respect. He has refused, for example, to even submit information to GSA concerning the dates he would like to have his work of art displayed at the federal courthouse. The plaintiff has thus made it impossible for GSA to comply with the district court's order.

Accordingly, the government has moved in the district court to have the plaintiff's case dismissed.

We have attached to this letter, for the Court's information, the government's Notice of Status, filed with the district court on July 29, 1988, and its Response to Order to Show Cause And Motion to Dismiss, filed with the district court on October 27, 1988. These documents set out plaintiff's refusal to cooperate in elaborate detail.

Very truly yours,

/s/ Richard A. Olderman
RICHARD A. OLDERMAN
Attorney, Appellate Staff
Civil Division

Enclosures

cc: Gregory Marshall, Esquire
432 "F" Street, Suite 205
San Diego, CA 92102

Michael J. Weaver, Esquire
Sheppard, Mullin, Richter
& Hampton
701 "B" Street, 10th Floor
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs, v. GENERAL SERVICES ADMINISTRATION, Defendant.	)	No. 86-0043-HLH *DEFENDANT'S RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO DISMISS*

On July 29, 1988, defendant filed a Notice of Status with the Court regarding the above-captioned action. The purpose of this notice was to advise the Court that defendant had made a reasonable, good-faith effort to comply with the Court's remand order of March 9, 1988, and bring this matter to a close, but that plaintiff had steadfastly refused to cooperate in this effort. Specifically, plaintiff has refused to provide defendant with the information needed to reconsider his permit application, such as the dates and location requested for the proposed work of art. Instead, plaintiff asserted that he would not

take any steps towards resolving his administrative proceeding until the Ninth Circuit had ruled on his appeal of the denial of his *Bivens* claims. In addition, plaintiff claimed that he was under no duty to supply the information requested by defendant, or in the time frame proposed by defendant.[1]

On August 12, 1988, the Ninth Circuit dismissed plaintiff's appeal without prejudice. Since that date plaintiff has taken no steps to secure the display of his artwork with defendant. He has still failed to provide the General Services Administration with proposed dates and locations for his artwork, despite the fact that the ground for his earlier refusal to cooperate – the pendency of his Ninth Circuit appeal – has been rendered moot.

In the face of plaintiff's uncooperative behavior, there is nothing left for the General Services Administration to do. It has attempted to reconsider plaintiff's application in as timely a manner as possible, but plaintiff has not cooperated in that effort. Indeed, plaintiff has expressly admitted that he is in favor of delaying the administrative decision (Plaintiff's Notice of Status, p. 3). Accordingly, plaintiff's conduct should be construed as a waiver of the cure of a new permit, and this action should be dismissed with prejudice.

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[1] The Court respectfully referred to Defendant's Notice of Status for a discussion of the history of this action at the administrative level since March 9, 1988, the date of the entry of judgment.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action with prejudice.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

/s/ Brook Hedge/alw
BROOK HEDGE

/s/ Theodore C. Hirt/alw
THEODORE C. HIRT

/s/ Anne L. Weismann
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	
v.	)	No. 86-0043-HLH
GENERAL SERVICES ADMINISTRATION, Defendant.	)	*ORDER*

The Court has considered defendant's motion to dismiss and the entire record herein. In view of the fact that plaintiff has elected not to proceed with his administrative remedies, and defendant has satisfied the terms of the remand order of March 9, 1988, to the best of its ability, and there is no reason for the Court to retain jurisdiction, it is hereby ordered that this action be and hereby is dismissed with prejudice, each party to bear its own costs and attorney's fees.

DATED: _____

_____
UNITED STATES
DISTRICT JUDGE

JOHN R. BOLTON
Assistant Attorney General
BROOK HEDGE
THEODORE C. HIRT
ANNE L. WEISMANN
United States Department
of Justice
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID AVALOS, et al., Plaintiffs,	)	
v.	)	No. 86-0043-HLH
GENERAL SERVICES ADMINISTRATION	)	*DEFENDANT'S NOTICE OF STATUS*
Defendant.	)	

On March 9, 1988, this Court entered a judgment which set aside the decision of the General Service Administration (GSA) to revoke a permit issued to plaintiff David Avalos and remanded this action to GSA for further action. The Court noted in its Memorandum Decision that on remand, "GSA may consider whether placement at another location or modification of the display as shown are necessary conditions upon reinstating any permit, if such is warranted by the facts found to exist. GSA's hearing officer may not be convinced, after hearing presentations of the parties, that the fact that the fence was initially suggested as a possibility by GSA clerical

employee excuses the failure to later add the fence to the already filed application." Memorandum Decision of March 9, 1988, p. 21. The Court also noted that the determination of how the matter is to be resolved is "not within this Court's function." *Id.*

In accordance with the Court's remand order, James J. Kane, then Acting Director for GSA's Region 9, advised plaintiff, by letter dated May 20, 1988 (Exhibit A), that GSA was prepared to reconsider his permit application and requested that he inform GSA in writing within 15 days from receipt of the letter "of the dates and location you propose for the exhibit of your work of art." Plaintiff was further requested to "submit a complete description of the proposed exhibit."

Plaintiff did not comply with GSA's request. Instead, by letter dated May 27, 1988 (Exhibit B), plaintiffs' counsel stated that Mr. Avalos "will not enter into discussions or negotiations or any other kind of activity with G.S.A. concerning the 'San Diego Donkey Cart' until the litigation between himself and G.S.A., Paul Hamilton, Philip Waggoner, and the Hon. Gordon Thompson, Jr. has been finally concluded." Plaintiffs' counsel interpreted GSA's May 20 letter as proposing "piecemeal settlement discussions," and stated his belief that "Mr. Avalos is under no duty to comply with these conditions [set forth in GSA's letter of May 20, 1988] which G.S.A. has unilaterally imposed, and will not do so." *Id.*

Thereafter, on June 20, 1988, Robert S. Drakes, Acting Director, Real Property and Safety Division, Region 9, advised plaintiff that "[w]ithout the requisite information from Mr. Avalos as to the future intended display of his

artwork, it is impossible for GSA to schedule and arrange for the exhibit. GSA will need to know the dates your client desires, whether or not Mr. Avalos desires to utilize a fence, the location sought, etc." (Exhibit C). Plaintiff's counsel was also advised that GSA would take no further action until it received a specific application from Mr. Avalos. *Id.*

In response, plaintiffs' counsel stated that "[u]ntil such time as there is a judgment either deciding the real issues or holding that the court declines to decide them, Mr. Avalos will not proceed as though there is no pending and unresolved litigation." Letter of June 28, 1988 (Exhibit D). In plaintiffs' view, the issue is "what relief will be granted for the *violation* of Mr. Avalos' *right* to display the art work in January, 1986." (Emphasis in original). *Id.*

This action is plainly at an impasse, caused by plaintiff's refusal to participate in any further proceeding before GSA or to facilitate GSA's resolution of this matter. Plaintiff elected to go forward with his claims against GSA at the district court level, over defendant's objection.[1] Plaintiff secured a ruling on those claims which clearly envisions further proceedings before GSA. Yet plaintiff now claims that, in plaintiff's words, this "insignificant fragment" of his case (Exhibit D) should be stayed pending the Ninth Circuit's resolution of his

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[1] Defendant GSA requested a stay of the district court proceedings until plaintiff's appeal of the denial of his *Bivens* claims was resolved. Plaintiff refused to join in this motion and requested, instead, that his claims against GSA go forward before this Court.

appeal, and refuses to participate in any proceedings before GSA.

The most charitable interpretation of plaintiff's latest stance is that plaintiff is waiving the cure of a new permit and only seeks money damages. If that is plaintiff's choice, GSA will simply refrain from taking any further action on remand and plaintiff should be held to have elected against pursuit of approval of an application to display the artwork.

Alternatively, plaintiff may be balking at proceeding before GSA in a futile effort to keep his Ninth Circuit appeal alive. If the proceeding proposed by GSA goes forward and plaintiffs' permit application is given further consideration consistent with this Court's ruling, plaintiff clearly will have no basis for relief from the Ninth Circuit. As this Court recognized in its decision granting summary judgment for the individual defendants, a *Bivens* remedy is not available where there is an alternative mechanism provided by law for relief. *See* Memorandum In Re Motions for Summary Judgment, April 16, 1987, p. 24. Of course, the mere availability of an adequate remedy at law, namely the permit application process provided by GSA's regulations, demonstrates that plaintiff has no need for a damage remedy.

That there is litigation pending in the Ninth Circuit does not undermine or otherwise alter the effect of this Court's March 9 ruling. Plaintiff has appealed a discrete aspect of this case – the denial of his *Bivens* claims against two GSA employees and Judge Thompson. While defendants argued, in the interest of judicial economy and to preserve the integrity of defendants' qualified defense,

that proceedings before this Court should be stayed pending resolution of plaintiffs' appeal, their motion was denied and the claims against the agency defendants were decided. Plaintiff cannot simply ignore the Court's ruling in this regard and its specific directive remanding this case to the agency for further proceedings, based on plaintiff's belief that the "real issues" in this case have yet to be decided. Plaintiff's letter of June 28, 1988, to Robert S. Drakes (Exhibit D).

In sum, plaintiff has steadfastly refused to participate in any further proceeding before GSA, despite GSA's reasonable good faith efforts to bring this matter to a close. Supplying the information which GSA requests – the dates and place for displaying the artwork and a complete description of what plaintiff seeks to display – does not place an undue burden on plaintiff. However, plaintiff has apparently elected to not pursue this remedy and to rely instead on his claim for monetary relief. In the face of this election, defendants submit that they have fully satisfied this Court's order on remand and this Court should so rule.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney-General

/s/ Brook Hedge
BROOK HEDGE

/s/ Theodore C. Hirt
THEODORE C. HIRT

/s/ Anne L. Weismann
ANNE L. WEISMANN
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Telephone: (202) 633-4469

Attorneys for Defendant

EXHIBIT A

(SEAL) General Services Administration, Region 9 (SEAL)
525 Market Street
San Francisco, CA 94105-2799

May 20, 1988

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. David E. Avalos
708 "D" Avenue
National City, California 92050

Dear Mr. Avalos:

As you know, Judge Harry L. Hupp of the United States District Court for the Southern District of California issued an opinion and final judgment in the above-referenced case on March 9, 1988. In his order and judgment, Judge Hupp remanded this case to the General Services Administration for further action in accordance with the Judge's findings of fact and legal conclusions.

In accordance with Judge Hupp's decision, we are now prepared to reconsider your application for a permit to

display your work entitled "San Diego Donkey Cart" on the grounds of the United States Courthouse in San Diego, California.

In order to further our efforts, we request that you inform this office in writing within 15 days from receipt of this letter of the dates and location you propose for the exhibit of your work of art. We also request that you submit a complete description of the proposed exhibit.

We will review your request and verify the availability of space and dates with Paul Hamilton. If your proposal cannot be approved as submitted, you will be contacted and provided a full opportunity to respond to our concerns.

Sincerely,

/s/ James J. Kane
James J. Kane
Acting Director
Real Property and Safety Division

cc: Greg Marshall

EXHIBIT B

GREGORY MARSHALL
ATTORNEY AT LAW
432 F Street, Suite 205
San Diego, California 92101

(619) 544-9501

May 27, 1988

James J. Kane
Acting Director,
Real Property and Safety Div.
General Services Administration, Region 9
525 Market Street
San Francisco, CA 94105-2799

Dear Mr. Kane:

This letter will constitute the response of David Avalos to your letter dated May 20, 1988. As I have noted in separate correspondence addressed to the attorneys in *Avalos v. G.S.A.*, I request that all future communications between our clients be made directly through counsel.

With regard to the substance of your letter, please note at the outset that Judge Hupp's judgment imposed no duty on Mr. Avalos to submit anything to G.S.A., and imposed no deadlines upon him. Mr. Avalos is under no duty to comply with these conditions which G.S.A. has unilaterally imposed, and will not do so.

In this same connection, Mr. Avalos will not enter into discussions or negotiations or any other kind of activity with G.S.A. concerning the "San Diego Donkey Cart," until the litigation between himself and G.S.A., Paul Hamilton, Philip Waggoner, and the Hon. Gordon

Thompson, Jr., has been finally concluded. The primary reason for this is that Mr. Avalos always has sought, and still seeks, an order reinstating the permit for the placement of the art work where and as it was placed originally, for a period of time equivalent to the period originally prescribed, without further conditions of any kind other than conditions that prohibit persons or agencies from interfering with or canceling the permit. So long as the granting of that relief remains a prospect, Mr. Avalos has no reason to engage in the procedure proposed in your May 20 letter.

Nothing in this letter should be taken as indicating Mr. Avalos would not be willing to enter into discussions or negotiations aimed at settling the whole of the litigation. He and I are prepared to do so, and in that connection will entertain any settlement offer that is extended by either all defendant parties jointly, or each and all of the defendant parties separately but simultaneously. Our only limitation in this respect is that we will not engage in piecemeal settlement discussions, which is what the May 20 letter proposes, in essence.

Sincerely,

/s/ Gregory Marshall
Gregory Marshall

GM:lm

cc: David Avalos
Richard A. Olderman
Anne L. Weismann
Michael J. Weaver

EXHIBIT C

CERTIFIED RETURN RECEIPT REQUESTED

June 20, 1988

Gregory Marshall
Attorney at Law
432 "F" Street
Suite 205
San Diego, California 92101

Dear Mr. Marshall:

This letter responds to your May 27, 1988 correspondence to James J. Kane, Acting Director, Real Property and Safety Division, concerning Mr. Avalos' election not to display his "San Diego Donkey Cart" at this time.

The district court's decision remanding the matter to the General Services Administration (GSA) for further action consistent with the Court's findings envisioned further proceedings by the parties. When no request or information was forthcoming from your client, Mr. Kane wrote Mr. Avalos in an effort to proceed according to the Court's decision. We are troubled by the implication in your letter that GSA was proceeding improperly, and reject any such claims. In any event, we hope this letter clarifies your understanding of our position.

Without the requisite information from Mr. Avalos as to the future intended display of his artwork, it is impossible for GSA to schedule and arrange for the exhibit. GSA will need to know the dates your client desires, whether or not Mr. Avalos desires to utilize a fence, the location sought, etc.

In sum, the suggestion that "the permit" merely be reinstated does not take into account the Court's intervening decision and the unresolved issue of what application would be before GSA for consideration. If you are communicating to GSA that Mr. Avalos does not desire to display his exhibit at this time, that is his decision. Consistent with the district court's decision, GSA will process and decide any subsequent permit application Mr. Avalos intends to present for display of his artwork. Given our interpretation of his position as you have expressed it in your letter however – that no permit application is to be forthcoming – GSA will take no further action in this matter until it receives a specific application from your client.

Sincerely,

/s/ Robert S. Drakes
ROBERT S. DRAKES
Acting Director, Real Property
and Safety Division

9B30 – General Reading File
cc: 9 P.M.
drj DRJAYNE:9L:6/20/88:dkj

GREGORY MARSHALL
ATTORNEY AT LAW
432 F Street, Suite 205
San Diego, California 92101

(619) 544-9501

June 28, 1988

Robert S. Drakes, Acting Director
Real Property and Safety Division
General Services Administration, Region 9
525 Market Street
San Francisco, CA 94105-2799

Dear Mr. Drakes:

This letter responds to your letter of June 20. I am sending copies of it to all the attorneys in the case, so that they will not be in the dark.

Let me take things in chronological order. First, Mr. Avalos "elects" not to display his art work until he has achieved a satisfactory conclusion to the present litigation. The reason for this is that the issue here is not, as you would have it, whether Mr. Avalos *presently* desires to display the art work; the issue is what relief will be granted for the *violation* of Mr. Avalos' *right* to display the art work in January, 1986.

Next, I think the District Judge did envision further proceedings. But he did not order further proceedings and I would not be surprised if he anticipated, as I did, that further proceedings would not occur until the litigation is fully concluded.

Your own attorney, Anne Weismann, will recall a time when she and I were in agreement that it made no sense

to go forward with District Court proceedings in the insignificant fragment of this case that was not dismissed in 1986, before the appeal of the dismissal was resolved. I understand that GSA now perceives a tactical advantage in this, to wit, that it can proceed as though this fragment of the case encompassed all the issues, and the litigation is now at an end. In this manner Mr. Avalos can be denied a decision on the real issues. However, that gambit is declined. Until such time as there is a judgment either deciding the real issues or holding that the court declines to decide them, Mr. Avalos will not proceed as though there is no pending and unresolved litigation.

Indeed, you impliedly state your understanding of the facts underlying our position, in that portion of your letter about the court's intervening (and interlocutory) decision and the unresolved issues in the case.

In sum, it appears that we end up in similar positions. You wonder why Mr. Avalos does not proceed as you would like him to do, as though there were no pending litigation. We wonder why the defendants do not, as we have, await the decision of the Ninth Circuit Court of Appeals in the pending litigation, before thinking about taking any further steps. Let us see what the court decides.

Sincerely,

/s/ Gregory Marshall
Gregory Marshall
GM:lm

cc: Richard Olderman
Michael J. Weaver
Anne L. Weismann
David Avalos